FILE COPY

Office Supreme C
F I L E
FEB 15
CHARLES ELMO

Supreme Court of the United States.

October Term, 1932.

No. 701

Angelo Quercia,
Petitioner,

v.

United States of America,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit, and Brief in Support Thereof.

ESSEX S. ABBOTT,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition for writ of certiorari	1
Questions presented	1
Statement	2
Specification of error	5
Reasons for granting the writ	5
Brief in support of petition	7
Jurisdiction	7
Argument	7
The defendant was entitled to have the jury charged on the essential elements of the defense	18
Conclusion	19

TABLE OF AUTHORITIES CITED.

Barham v. United States, 14 Fed. (2) 835	14
Cook v. United States, 14 Fed. (2) 833	14
Doherty v. Levine, 278 Mass. 418	15
Graham v. United States, 12 Fed. (2) 717	14
Grillo v. United States, 26 Fed. (2) 461	15, 18, 19
Hicks v. United States, 150 U.S. 442	9, 12
Malaga v. United States, 57 Fed. (2) 822	17, 18
Mullen v. United States, 106 Fed. 895	9, 12
O'Shaughnessy v. United States, 17 Fed. (2) 225	14
Parker v. United States, 2 Fed. (2) 710	13
Rex v. Mason (1932), 18 Cohens' Appeal Reports	11
Rex v. O'Donnell (1917), 12 Cohens' Criminal Appeal Reports, 219	11
Smith v. United States, 18 Fed. (2) 896	14
Starr v. United States, 153 U.S. 614	12
Sunderland v. United States, 19 Fed. (2) 202	15
United States v. Breitling, 20 How. 252	12
United States v. Cohen, 56 Fed. (2) 28	16, 18, 19
Weare v. United States, 1 Fed. (2) 617	13
Halisbury's Laws of England, vol. 9, p. 369	11
Judicial Code, sec. 20A, as amended by Act of February 13, 1925	7

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents Angelo Quercia of Boston in the Commonwealth of Massachusetts, and prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on the third day of January, 1933, affirming the conviction in the United States District Court of said petitioner.

QUESTIONS PRESENTED.

It is requested that this Court review and revise rulings of law decided by the Circuit Court of Appeals, as we think, erroneously.

1. That a presiding judge in a criminal case has exceeded his prerogative in instructing a jury upon the facts when he makes the following statement during his charge:

> "You may have noticed Mr. Foreman and Gentlemen that he wiped his hands during his testimony. It is

rather a curious thing but that is almost always an indication of lying. Why it should be so we do not know, but that is the fact. I think that every single word that man said except when he agreed with the Government's testimony was a lie."

2. That the presiding judge refused to charge the jury as to the essential elements of the offense charged in the indictment by refusing to give, in form or in substance, instructions seasonably requested by the defendant, or to make any allusion in his charge to the essential elements of the offense charged, which were issues in the case.

Statement.

The petitioner was indicted with one Joseph Brogna at the September Term of the United States District Court, to wit, October 21, 1931, for violating the Harrison Narcotic Law (Act of Congress December 17, 1914, as amended). Brogna pleaded guilty and was sentenced to three years' imprisonment. The petitioner stood trial.

The indictment contained two counts, the first count alleging—

> "That Joseph Brogna, of Chelsea in the District of Massachusetts and Angelo Quercia of Somerville, in the District of Massachusetts, on or about the 9th day of September in the year 1931, at Somerville, in the District of Massachusetts, did wilfully, knowingly and unlawfully sell, dispense and distribute to one John Hesse of Boston in the District of Massachusetts, a compound, manufacture, salt, derivative and preparation of opium, to wit, three ounces, more or less of morphine, said morphine not being sold, dispensed in or from an original package."

The second count is the same, only the sale is alleged as of September 13, 1931, and the quantity is two ounces.

Upon his conviction the defendant was sentenced to a term of five years on each count, said sentences to run consecutively.

One Hesse, a government narcotic agent, testified in substance that for a month or two prior to the arrest of Brogna and Quercia he had been purchasing drugs from Brogna. About a month and a half after the first purchase from Brogna, Hesse met Brogna by appointment. A dispute as to price arose and Brogna left. Later on Brogna returned, accompanied by Quercia. A talk was had, during which talk the price of drugs was discussed, and Quercia joined in the conversation. Brogna and Quercia left, and Brogna returned alone and delivered drugs to Hesse. The transaction was the only one in which Quercia appeared, and no drugs were actually delivered to Hesse in Quercia's presence.

Quercia testified in his own behalf, and at the close of the evidence and arguments the District Judge charged the jury as follows:

"Mr. Foreman and Gentlemen of the Jury:

"I will say a few words to you first about your functions and mine. I give you the law, and what I say is the law is binding on you; and if I state it wrong the Court of Appeals will correct me. I tell you what the law is, and that you must abide by. I also in this court, in the United States Court, have the right to give you my opinion on the evidence, to say whether I think a certain witness is truthful or not, to tell you my opinion on the whole evidence; but that is not binding on you. As to the facts, you must disregard any opinion I may give you of the evidence; and it is your duty to go against my opinion if you don't agree with it.

"Now, as in all criminal cases, the defendant at the bar is presumed innocent until you are persuaded beyond a reasonable doubt by the evidence offered by the Government that he is guilty. A reasonable doubt merely means a doubt for which you can give a reason.

It is the kind of a doubt which you would act upon if you were going about your own affairs. There is no magic, no hidden meaning to 'Reasonable doubt'. It is merely a doubt founded not on a whim or a hunch, as we call it, but on some fact, for which you can give a reason.

"There is another thing which I should tell you. That is, the fact that this defendant was indicted—you heard the indictment read—the fact that he was indicted is no evidence against him. An indictment is merely a statement of the grand jury of twenty-three men that there is something which ought to be brought before you jurors, you petty jury, as we call you, of twelve men. The indictment is no evidence against him, and he is presumed to be innocent until you are persuaded beyond a reasonable doubt that he is guilty. And I rule as a matter of law, Mr. Foreman and gentlemen, if you believe the evidence for the Government you may find him guilty under this indictment. That ruling will be excepted to by the defendant, as I understand, and the question of law thereby arising will be tested out in the upper court; but I rule, if you believe the evidence of Mr. Hesse and the others, you may find this defendant guilty on both counts. It is a question of whom you will believe.

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

"I don't think I care to say anything else, Mr. Foreman and gentlemen.

"I will save your exception, Mr. Carroll."

The petitioner sought to reverse the conviction on the ground that he was not guilty of the sales set out in the indictment, that his motion for a directed verdict of "not guilty" was denied, that his requests for instructions were refused, and further that the District Judge exceeded his prerogative in commenting on and characterizing the defendant's testimony as "a lie," and also in substance and effect testifying himself as to a matter which nowhere appears in the testimony, and as to which there was no testimony, and which was not in issue, namely, that it was a *fact* that a person who wiped his hands during his testimony was lying.

The Circuit Court of Appeals, in a two-to-one opinion, the Senior Judge writing a dissenting opinion, affirmed the conviction.

Specifications of Error.

1. The Circuit Court of Appeals erred in its ruling that it was not error for a District Judge in the course of his charge to comment on the defendant's testimony, and to testify as to a fact as to which no evidence had been offered, and which had no relation to the charge on which the petitioner was being tried.

2. The Circuit Court of Appeals erred in its ruling that it was not error for the District Judge to refuse the instructions requested by the defendant, said instructions being pertinent to the issues, and to charge the jury with no reference to the provisions of law pertinent to the offenses charged.

Reasons for Granting the Writ.

1. That said decision is unsound in law and denied the defendant a fair and impartial trial.

2. That said decision is against the weight of authority.

3. That there is a limit beyond which the presiding judge cannot go, in his charge to the jury, and that the charge in the instant case goes so far beyond any of the decided cases that there should be an authoritative decision in the instant case.

4. That there have been three decisions of the Court of Appeals for the First Circuit reversing the same District Judge for the unfair comment in his charge, but recently the Circuit Court of Appeals, with a change of membership, has shown a tendency to overlook such comment on the part of the District Judge and to make light of it, as may be seen by the remarks of the Court in affirming the decision of the District Court in the instant case.

5. That unless some limit is placed upon comment by the Court in its charge to the jury, the trial of criminal cases in the First Judicial District will descend to such a level that it will be impossible for a defendant to secure a fair and impartial trial.

6. That the decision in the instant case has caused such wide comment in the First District that the bar in general feel that it is time for some decision of the Supreme Court upon the matter of prejudicial charges and conflicting decisions as in the First Circuit and elsewhere.

7. That the decision in the instant case affirms a judgment of conviction where the trial judge refused to give instructions to the jury upon the essential elements of the offenses charged.

For the foregoing reasons, and for those which hereinafter appear in the brief and argument, your petitioner respectfully prays that his petition be granted.

ESSEX S. ABBOTT,
Attorney for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

ANGELO QUERCIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

The opinion of the Circuit Court of Appeals in affirming the conviction of the petitioner has not been printed.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 3d day of January, 1933. The jurisdiction of this Court is invoked under section 20A of the Judicial Code, as amended by the Act of February 13, 1925.

ARGUMENT.

This case presents a question of the greatest importance, affecting substantial rights of a defendant, namely, the right to a fair and impartial trial. The question is as to the right of a trial Court to comment on a defendant's testimony and express an opinion that the defendant's testimony was "a lie," and then to go further and to testify in substance and effect, as was done in the instant case, that, although "*why it should be so, we don't know, but that is the fact*" that a man who *wipes his hands is lying.* A de-

fendant is presumed under our law to be innocent until a jury finds him guilty. If this presumption exists, is it not prejudicial and a taking away of a substantial right for a judge to add his testimony as to what he says is a fact, upon which no evidence has been offered? A judge may comment on the evidence, but it cannot be held to be fair and impartial for a judge to say to a jury: "Every single word that man said, except when he agreed with the Government testimony, was a lie."

If it be held to be fair comment for a judge to say what was said in this case, what are the limits as to fair comment? What is to prevent a judge, who has a dislike for red neckties, saying to a jury: "You may have noticed, Mr. Foreman and Gentlemen, that the defendant wore a red necktie while testifying. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact." This is an extreme example, but one can readily see the danger that exists unless this Court takes the responsibilty of deciding if this is fair comment.

Until the decision in the instant case it has been generally understood by bench and bar that there is a limit beyond which a trial judge may not go in his charge to the jury. Now, however, the majority opinion says: "There is no hard and fast rule that can be laid down in determining whether or not a judge has exceeded his prerogative in instructing the jury on the facts."

The majority opinion of the Circuit Court of Appeals weakly attempts to justify its position by saying that, because the defendant's testimony was not printed in the record, he may very well have deserved the characterization. This is nothing more than an evasion of the issue. It appears to be nothing more than a subterfuge and a desire to the majority of the Court to gloss over an embarrassing situation, as may be seen from the statement of the majority opinion: "It is difficult to conceive of a jury accepting

seriously such a standard for determining whether a witness was telling the truth."

The weakness of that statement is apparent, not only from what appears in the charge to the jury set out in the record, but also from the influence of the great weight of the judge, to "whose lightest word the jury, properly enough, gives a great weight." *Hicks* v. *United States, infra.* It is clear from the reading of the judge's charge that he meant that the jury should accept him "seriously," and there is no reason to suppose that the jury did not take him "seriously" and render their verdict accordingly.

We must assume, and the Appellate Court should have assumed, that the jury was "accepting seriously" every word uttered by the judge in his charge, especially in the light of judicial decisions and express language as to "the great weight which attaches to intimations of opinion from the Judge," to quote the words of Judge Day, afterwards a Justice of the Supreme Court, in *Mullen* v. *United States, infra.*

It is certain that the statement of the trial judge was made with the deliberate intent to influence the jury because the brief charge dealt only with the generalities of reasonable doubt, the indictment being no evidence against the defendant, and the presumption of innocence. Then the charge, without stating the propositions of law connected with the particular offenses charged in the indictment, and ignoring the defendant's requests for instructions, goes on to deal with the question of the defendant's veracity, and we find these words: "If you believe the evidence for the government you may find him guilty under the indictment . . . It is a question of whom you will believe." And then, feeling that the jury might not believe the government's witness, but might believe the defendant, the judge goes on to give his own expert testimony as to wiping hands being "almost always an indication of lying," although adding in the next sentence: "*Why* it should be

so *we don't know but that is the fact.*" If this would not influence the jury, and prejudice the jury against the defendant, then, we submit, that there is nothing that a judge could say to influence the jury to the prejudice of a defendant who has testified in his own behalf.

And here we have a judge giving expert testimony of the meaning of a gesture or mannerism or idiosyncracy of a witness under the nervous strain of testifying when ten years of his liberty is at stake, that such is a fact indicating lying, although the judge does not know why it should be so, and so tells the jury, and apparently assumes that the jury does not know either. This passes anything in the decided cases.

And it is fundamentally and essentially wrong to have testimony of an alleged "fact" going into the case without an opportunity for cross-examination. Of course there is no such opportunity when the evidence is closed and the testimony of the alleged "fact" comes from the judge in his charge.

The majority opinion also states: "In this case the testimony of the defendant is not printed in the record." The record states at the conclusion of the summary of the testimony of the government witnesses and the defendant: "The foregoing is all the material evidence." The defendant's full testimony by question and answer was unnecessary under Rule 8 of the Supreme Court. The rule was followed as to all the witnesses except government witness Hesse, upon whose testimony the government case was founded, because this was the only witness whose testimony in any way tended to connect the defendant with the offenses charged in the indictment.

The record states (R. 313): "The defendant testified upon his own behalf and made a general denial of all the charges." This is certainly an adequate summary of the substance of the testimony of the defendant under the rule. It would not have added to the force of the record to set forth his testimony in more detail, to say nothing of setting

it forth by question and answer. The characterization objected to is chiefly objectionable because of the premise upon which the trial judge based it, namely, that he wiped his hands while testifying, and therefore was a liar. It was not because of anything the defendant *said* while testifying, so consequently could not have appeared in the record.

The following authorities throw considerable light on how far a trial judge may go in his charge in commenting on evidence.

In England the law is:

> "1. After the close of the reply of the Counsel for the Prosecution the presiding Judge sums up the whole case and the evidence to the jury, gives his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion on such matters."
>
> Halisbury's Laws of England, vol. 9, at p. 369.

Attention is called to the case of *Rex* v. *Mason* (1932), 18 Cohens' Appeal Reports. In this case the trial Court said: "I invite you to take such and such a course." The Court of Criminal Appeals said, in quashing the conviction: "The idea of inviting a jury is suited rather to an advocate than to a judge."

In *Rex* v. *O'Donnell* (1917), 12 Cohens' Criminal Appeal Reports, 219, the Criminal Court of Appeals refused to quash the verdict on the ground that the presiding judge had not exceeded his authority, holding that a judge in directing a jury is clearly entitled to express his opinions on the facts of the case, provided he leaves the issues of the fact to the jury to determine. A judge apparently is not justified in directing a jury or using in the course of his summing up such language as leads them to think that he is directing them, and that they must find the facts in the way which he indicates.

In the United States we have the following cases:

Hicks v. *United States*, 150 U.S. 442. The defendant had gone on the witness stand. The judge said that there was a conflict as to the material facts between his statements and the statements of the other witnesses who were telling the truth, and that the jury would have a contradiction that would weigh against the statements of the defendant as coming from such witnesses, etc. In the majority opinion the Court said that the privilege of the defendant to testify in his own behalf "would be a vain one if the judge, to whose lightest word the jury, properly enough gives a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

In *Starr* v. *United States*, 153 U.S. 614, it was held "that there were limitations on the power of a Federal Court in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office."

In *United States* v. *Breitling*, 20 How. 252, the Court said: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In *Mullen* v. *United States*, 106 Fed. 895, Day, C.J., C.C.A. 6th Cir., said: "We do not understand the practise in the Federal Court, liberal as it is, to permit such comments outside of the testimony to go to the jury

with the great weight which attaches to intimations of opinion from the judge."

In *Weare* v. *United States*, 1 Fed. (2) 617, in reversing a conviction, the Circuit Court of Appeals said: "Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the court. Its members are sensitive to the opinions of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion and that they should follow their own judgment."

In *Parker* v. *United States*, 2 Fed. (2) 710, the District Judge said: "Personally I would rather believe a girl who had been wronged than the man who would desert his wife and children to wrong her, but that is another impression that is personal to me, and which you are not to regard in any way, whatsoever, or for any purpose." The Circuit Court of Appeals said: "The mere statement that the jury was not obliged to follow the opinion of the Judge did not correct the error"; indeed that statement may well be put in such

a form as to imply disparagement of the jury's intelligence, if it does not agree with the judge; the present charge does not lack that atmosphere.

In *Graham* v. *United States*, 12 Fed. (2) 717, the Court said, in reversing the District Court: "It is however of first importance, both to the particular defendant who may be on trial and to the administration of justice generally, that everyone shall recognize that what is said from the bench is the cool and well balanced utterance of an impartial judge, and has in it naught of the heat and partisanship of the advocate."

In *Cook* v. *United States*, 14 Fed. (2) 833, a conviction was reversed where the judge said that "He gave no credence whatever to the statement of the defendant," and repeated it many times.

In *Barham* v. *United States*, 14 Fed. (2) 835, the same Court, reversing the conviction, says: "The language objected to is that in which the court stated that he drew certain inferences, and expressed the opinion that certain material facts were true, although as the Court said, 'there is no evidence of that'."

In *O'Shaughnessy* v. *United States*, 17 Fed. (2) 225, at 228: "General statements in the charge, to the effect that the jury were at liberty to disregard the Court's views as to guilt or innocence, and to base their verdict on their own conclusions from the evidence, did not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or, justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence was conflicting."

In *Smith* v. *United States*, 18 Fed. (2) 896, where the judge made a statement that he believed a witness told the truth and proceeded to give his reasons, it was held reversible error, as being not within the limits of legitimate judicial comment.

In *Sunderland* v. *United States,* 19 Fed. (2) 202, in reversing a conviction, the Court said: "A fair trial means that while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

In the State Courts of Massachusetts exceptions have been sustained in civil cases where the attorney in argument for a party has made a statement of fact. The statement of an attorney, whose duty it is to be at least partial to his client and his client's cause, could have but little effect on the jury in comparison with utterances of the judge, whose function is to instruct the jury and to give the parties a fair and impartial trial. We cite only the latest case in the reports.

In *Doherty* v. *Levine,* 278 Mass. 418, 419, in the opinion by Rugg, C.J., it is said:

> "The statement in argument by the plaintiff's attorney was entirely improper and prejudicial in nature. It was a statement of fact purporting to be on his personal knowledge or at least concerning which the inference well might be drawn that he had personal knowledge. It was a matter concerning which testimony should have been introduced if it was to be considered by the jury." (Citations.)

In Massachusetts the following cases have arisen on the right of the District Judge to comment on the defendant in his charge.

> *Grillo* v. *United States,* 26 Fed. (2) 461. In this case the Court characterized the defendant's testimony. The Circuit Court of Appeals, then made up of Anderson, Bingham, and John, JJ., reversed the lower Court, and said:

"It appears in the bill of exceptions that the court, having instructed the jury as to the law of the case, said: 'So much for the law. Now, as to the facts. It would serve no useful purpose for me to rehearse them. The defendant took the stand, and the case turns on whether you think he was telling the truth.' We think this statement was misleading. It was made at the very close of the charge. It gave the jury to understand that, if they did not believe the defendant they could find him guilty. To so charge was a plain error of law. If the jury did not believe the defendant was telling the truth, that would not justify a verdict of guilty. They must go further and find that the defendant entered into a plan or conspiracy with other persons to bring liquor into the country without paying the customs duties and without a permit, and that some overt act was done in furtherance of the conspiracy; and they must be satisfied beyond a reasonable doubt of the proof of these facts. Although the court in the earlier part of its charge outlined what the government was required to prove to establish its case, we nevertheless think that in this parting sentence to the jury it fell far short of what it should have done, and, by so doing, may have misled the jury and excused it from performing its full duty, to the defendant's prejudice."

Later, in the case of *United States* v. *Cohen*, 56 Fed. (2) 28, at p. 30, we find the following:

" 'Now this is a very simple question, and it is entirely a question of whether this man Cohen was the man who ran away from that automobile on the 14th of August, 1929. It is entirely a question of fact. Do you believe him, gentlemen? I do not; but it is entirely for you to say. That is all I care to say, gentlemen.' But the issue in the case was not whether Cohen was the man who ran away from the automobile on the 14th of August. It was whether on that date he unlawfully

possessed and unlawfully transported intoxicating liquor."

In the case of *Malaga* v. *United States*, 57 Fed. (2) 822, at 828, we find the following statement by the Court in reversing the conviction because of the judge's charge:

"But a statement of facts not in evidence, an argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty, may not be sufficiently neutralized by a reminder that it is for the jury to say.

"That the record before us gives a full and fair picture of what occurred in the trial below, we are reluctant to believe; but we cannot base our conclusions on conjecture, or on what probably occurred.

. . . . . .

"We think a trial judge should hesitate in expressing his opinion on the guilt of a respondent in a criminal case, though he may be permitted to give his opinion on the evidentiary facts. Argumentative discussion on the effect of evidence as proof, or the inference to be drawn from the acts of witnesses, or of the respondent in a criminal case, are universally recognized as out of place from the bench.

"One of the underlying principles of our jurisprudence is that the scales of justice in the trial of a cause must be held in even balance by the presiding judge. It is our pride that under our Constitution and laws a respondent in a criminal case, though guilty, is entitled to a fair and impartial trial."

All three cases were reversed, yet in the instant case, which is far stronger than any one of the three previous cases, we find the majority opinion scrapping the cases and affirming the conviction.

The three foregoing cases show the progressive stages, from the time when the Circuit Court of Appeals for the First Circuit held as in the Grillo case, *supra,* to the instant case, of the tendency of the District Judge presiding in the criminal session in the District of Massachusetts to ignore the principles of law involved in the offenses charged, and the necessary elements of the alleged offense to be proved to the satisfaction of the jury beyond a reasonable doubt to justify a conviction, and leave to the jury, as the principal issue to be decided by them, the question of whether or not the defendant was lying, instead of proof beyond a reasonable doubt of the essential elements of the alleged offense. The course so pursued has been insidious, steady, and progressive, as is clearly illustrated by the charges to the jury in the Grillo case, the Cohen case, the Malaga case, all hereinbefore cited, and the instant case.

The Defendant was Entitled to have the Jury Charged on the Essential Elements of the Defense.

The defendant contended before the Circuit Court of Appeals, and now contends, that he was entitled to have the judge charge the jury with reference to the essential elements of the offense, as to which he seasonably requested specific instructions set forth in the record, and not to have the jury decide the case, not upon proof beyond a reasonable doubt of the essential elements of the offense, but on the issue of his veracity. It may be that the jury did not find, and could not have found, that all of the essential elements of the offense charged had been proved beyond a reasonable doubt, and may have reached their verdict because they did not believe the defendant, or believed that the defendant was lying because the judge said he believed the defendant was lying, and that it was an indication of lying because the defendant wiped his hands in his testimony.

Such was the law in the First Circuit in the Grillo case, *supra,* and the part of the opinion in the Grillo case hereinbefore quoted seemed to the defendant to be an irresistible argument, and it would have been, had the Grillo case been followed instead of scrapped. The Cohen case, *supra,* is an added authority, and, at the time of the decision of the Cohen case, the Grillo case was apparently being accepted as the law in the First Circuit, from the reasoning of the opinion, although not therein cited. The reasoning is along the same lines.

Conclusion.

And in conclusion it is respectfully submitted that the charge of the presiding judge, ignoring the essential elements of the offense charged, refusing pertinent requests thereto, leaving the issue to depend upon the veracity of the defendant, characterizing the testimony of the defendant as "lying," and adding his own testimony of what he stated to be "the fact" that a man who wipes his hands during his testimony is lying, although we don't know why, went far beyond fair comment, denied the defendant the fair and impartial trial to which he was entitled. For these reasons, more fully hereinbefore stated, supported by authorities, the writ of certiorari should issue.

ESSEX S. ABBOTT,
Attorney for Petitioner.